

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROBERT J. ROY,	:	
Plaintiff,	:	
	:	
-vs-	:	Civ. No. 3:01CV306(PCD)
	:	
LARRY G. MASSANARI, ¹ Acting	:	
Commissioner, Social Security	:	
Administration,	:	
Defendant.	:	

RULING ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

Plaintiff moves pursuant to 42 U.S.C. § 405(g) and FED. R. CIV. P. 12(c) for judgment on the pleadings seeking reversal of the decision of the Administrative Law Judge (“ALJ”) denying him social security benefits. Defendant cross-moves for an order affirming the decision of the ALJ. For the reasons set forth herein, plaintiff’s motion is denied and defendant’s motion is granted.

I. BACKGROUND

Plaintiff applied for disability insurance benefits (“DIB”) under Title II, 42 U.S.C. §§ 401-433 , and for supplemental security income (“SSI”) under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381a and 1382c(a)(3)(A), alleging as his disability an inability to read, depression, and dyslexia. The Social Security Administration Regional Commissioner denied the application and the subsequent request for reconsideration. Plaintiff then sought a hearing before the ALJ.

The ALJ affirmed the Commissioner’s denial after a hearing. Plaintiff provided the only

¹ Larry G. Massanari became the Acting Commissioner of Social Security on March 29, 2001. Pursuant to FED. R. CIV. P. 25(d)(1), Larry G. Massanari is substituted for Kenneth S. Apfel, the former Commissioner, as the defendant in this action.

testimony at the hearing. The ALJ had before him the reports of four different mental health practitioners. The reports of Dr. Jesus A. Lago and Dr. Lloyd K. Daniels were the product of their examination of plaintiff. The other two reports by Dr. Thomas M. Hill and Dr. Jose R. Santos were the product of their review of the records of Dr. Daniels's examination.

Based on the above reports in conjunction with plaintiff's testimony at the hearing, the ALJ found as follows.

1. The claimant met the disability insured status requirements of the Act on January 22, 1988, the date the claimant stated he became unable to work, and has acquired sufficient quarters of coverage to remain insured only through September 30, 1994.
2. The claimant has not engaged in substantial gainful activity since January 22, 1998.
3. The medical evidence establishes that the claimant has borderline intellectual functioning, depression, and substance abuse (in possible early remission), impairments which are severe but which do not meet or equal the criteria of any of the impairments listed in Appendix 1, Subpart P, Regulations No. 4.
4. The claimant's statements concerning his impairments and their impact on his ability to work are not entirely credible.
5. The claimant lacks the residual functional capacity to understand, remember, and carry out complex instructions or perform tasks requiring interpretation of written instructions.
6. In his past work as a delivery helper, the claimant was not required to interpret written instructions or perform complex tasks.
7. The claimant's past relevant work as a delivery helper did not require the performance of work functions precluded by his medically determinable impairments.
8. The claimant's impairments do not prevent him from performing his past relevant work.
9. The claimant has not been under a disability, as defined in the Social Security Act, at any time through the date his insured status expired, or at any time through the date of

this decision.

The ALJ concluded that plaintiff was entitled to neither DIB² nor SSI. The Appeals Council subsequently denied plaintiff's request for review. Plaintiff then filed the present action seeking to reverse the ALJ's decision.

II. DISCUSSION

Plaintiff argues that the ALJ's decision should be reversed for the following reasons: (1) the ALJ's findings as to plaintiff's credibility are improper; (2) the ALJ substituted his opinion for that of a medical expert; (3) the ALJ failed to consider the mental demands of past relevant work in finding plaintiff was not disabled; and (4) the finding that plaintiff is not vocationally disabled is not supported by substantial evidence. Each will be discussed in turn.

A. Standard of Review

A court reviewing an ALJ's decision denying benefits under the Social Security Act must first determine whether the ALJ "applied the correct legal principles in making the determination [and] . . . then decide whether the determination is supported by 'substantial evidence.'" *Johnson v. Bowen*, 817 F.2d 983, 985 (2d Cir. 1987). Substantial evidence is more than a scintilla and is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). The reviewing court will "set aside the ALJ's decision only where it is based upon legal error or is not supported by substantial evidence." *Balsamo v. Chater*, 142 F.

² The Social Security Administration ("SSA") determined that plaintiff earned enough credit to entitle him to DIB up to September 30, 1994 and denied the request for failing to establish a disability prior to that date. Plaintiff does not dispute that September 30, 1994 is the relevant date for purposes of DIB.

3d 75, 79 (2d Cir. 1998). 42 U.S.C. § 405(g) provides that “the findings of the [ALJ] as to any fact, if supported by substantial evidence, shall be conclusive”

B. ALJ’s Determination on Plaintiff’s Credibility

Plaintiff argues that the ALJ’s finding as to his lack of credibility, specifically assessments based on the effect of alcohol or narcotics use on his ability to work, is improper. Defendant responds that the credibility assessment is supported by substantial evidence.

An ALJ may discredit a plaintiff’s subjective assessment of his disability after reviewing medical testimony, plaintiff’s demeanor and other indicia of credibility. *See Tejada v. Apfel*, 167 F.3d 770, 775-76 (2d Cir. 1999). The ALJ is obligated to “assess subjective evidence in light of objective medical facts and diagnoses.” *Williams v. Bowen*, 859 F.2d 255, 261 (2d Cir. 1988); *see also* 20 C.F.R. § 404.1527(c)(2) (“If any of the evidence in [the] case record, including any medical opinion(s), is inconsistent with other evidence or is internally inconsistent, we will weigh all of the evidence and see whether we can decide whether you are disabled on the evidence we have.”). Failure to make a credibility finding set forth with sufficient specificity to permit intelligible plenary review of the record may constitute a failure to establish disability. *See id.* at 260-61.

Plaintiff’s argument as to credibility assessments involving his alcohol consumption is without merit.³ The ALJ concluded that plaintiff’s “statements concerning his impairments and their impact on

³ Plaintiff also argues that “[w]hether a claimant uses alcohol or not is immaterial unless such usage is shown to have an impact on the claimant’s ability to work, and no such finding is made here.” It is unclear how the consideration of plaintiff’s alcohol use would render the ALJ’s decision legally infirm. There is no law precluding him from discussing the same and substance abuse becomes material to a benefit determination only after the claimant is found to be disabled. *See* 20 C.F.R. § 404.1535(a) (“If [the SSA] find[s] that [a claimant is] disabled and ha[s] medical evidence of [his or her] drug addiction or alcoholism, [the SSA] must determine whether [his or her] drug addiction or alcoholism is a contributing factor material to the determination of disability.”). There is thus no

his ability to work are not entirely credible.” This conclusion was based, in part, on discrepant reports as to alcohol consumption as plaintiff provided three separate responses during the same relative time period in interviews with two psychiatrists and in a questionnaire for the Social Security Disability Determination Service. In one response, he indicated that he had not consumed alcohol in eighteen months, in another he indicated he had not consumed alcohol in five years and in a third he indicated that he continued to consume alcohol. The ALJ’s determination as to plaintiff’s credibility was not, as plaintiff argues, a finding that alcohol abuse was material to his disability but instead suggests an impression on the overall credibility of plaintiff’s testimony after he provided conflicting statements at various stages of the disability review process.

Plaintiff also takes issue with the ALJ’s statement that plaintiff’s apparent fatigue during a medical review “could certainly be explained by his usage of narcotics.” This statement was made in the context of the ALJ’s discussion of Dr. Daniels’s report supportive of plaintiff’s contention that he is disabled. In the report, Dr. Daniels noted that plaintiff was fatigued and depressed at the time of the August 8, 1998 interview. He further stated that “[d]uring the 1970s, [plaintiff] used some drugs, but does not do so at this time.” Dr. Daniels’s statement conflicted with plaintiff’s testimony at the hearing that he was using heroin daily during the summer of 1998. Reading the statement at issue in context, the ALJ was not engaging in “wild medical speculation” as plaintiff argues but rather represents a credibility assessment of a report premised on seemingly inaccurate facts. The inference was reasonably derived using the date of the evaluation and plaintiff’s testimony as to his substance abuse contemporaneous to

basis for concluding that the ALJ’s statement constitutes reversible error.

that date. The statement therefore does not amount to wild speculation and was not improper.

C. ALJ's Discretion in Use of Medical Expert's Opinion

Plaintiff further argues that the ALJ substituted his opinion for that of Dr. Daniels when he discounted the favorable report reasoning that Dr. Daniels “was not aware that [plaintiff] was working at the time” and was not aware that plaintiff “was actively using narcotics.” Defendant replies that the ALJ did not substitute his opinion for Dr. Daniels but rather considered the report in light of plaintiff’s own testimony.

It is beyond question that an ALJ may not reject all medical evidence favorable to a finding of disability without a reasonable basis for so rejecting. *See Fiorello v. Heckler*, 725 F.2d 174, 176 (2d Cir. 1983). Nor is it the ALJ’s function to “reconcile explicitly every conflicting shred of medical testimony.” *Id.* The burden is on plaintiff, not defendant, to establish a medically determinable impairment. *See Bowen v. Yuckert*, 482 U.S. 137, 146, 107 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); *Balsamo v. Chater*, 142 F.3d 75, 80 (2d Cir. 1998).

In the present case, there is no indication that the Dr. Daniels’s opinion was rejected in its entirety. The ALJ may have accorded the opinion a lesser weight because of the assumptions on which it was premised. *See supra* Part II.B. However, he also concluded that plaintiff had “borderline intellectual functioning” and suffered from depression,⁴ both of which were consistent with the

⁴ Plaintiff testified that his depression began in 1980 when he was diagnosed and treated for cancer. Social Security payment records indicate that he was employed with Coca-Cola until 1986. The record supports that plaintiff worked with some manifestation of his depression for six years with former employer. He did not cite depression as a basis for leaving his former employment. Plaintiff provides no support for his argument that he is dyslexic but the reports suggest that he is functionally illiterate.

conclusions of Dr. Daniels. Plaintiff does not, and could not, argue a basis in law by which an ALJ must accept a medical opinion in its entirety even when premised on arguably false representations. *See Pulliam v. Sullivan*, 769 F. Supp. 1471, 1478 (N.D. Ill. 1991). It is plaintiff's burden to establish the existence of a disability, not the SSA's burden to prove otherwise. *Balsamo*, 142 F.3d at 80. This is not a case, as plaintiff argues, "[w]here the total record is overwhelmingly in support of a finding of disability," *see Stanfield v. Chater*, 970 F. Supp. 1440, 1461 (E.D. Mo. 1997), and the contrary result may only be attributed to an ALJ improperly assuming the role of medical expert. Plaintiff's own testimony rendered the medical opinion less credible because of the misinformation on which it was based. Such inconsistencies are documented in the ALJ's opinion and are consistent with the evidence before him. There is no indication that the ALJ rejected Dr. Daniels's opinion in its entirety without a reason for doing so. *See Fiorello*, 725 F.2d at 176. The ALJ's credibility assessment of Dr. Daniels's report is supported by evidence in the record and there is no basis on which to suggest that the ALJ questioned anything other than the facts provided to Dr. Daniels by plaintiff in the examination. The argument is therefore without merit.

D. ALJ's Decision on Mental Demands of Plaintiff's Past Work and Plaintiff's Ability to Return to his Past Work

Plaintiff argues that the ALJ was required to make explicit findings as to his past relevant work and failed to do so. Defendant responds that plaintiff failed to establish that he could not return to his previous employment.

Disability for purposes of obtaining Social Security benefits is determined pursuant to a five-step test. *Balsamo*, 142 F.3d at 80. The first determination is whether the claimant is currently engaged

in substantial gainful activity. *Id.* Next, does the claimant have a “severe impairment” which significantly limits his physical or mental ability to do basic work activities. *Id.* The third inquiry is whether medical evidence establishes an impairment listed or equal to one listed in Appendix 1 of the regulations. *Id.* A claimant is considered disabled on satisfying this requirement. *Id.* The fourth inquiry, applicable only if the impairment claimed is not listed, is whether the claimant has the residual functional capacity to perform his past work. *Id.* Finally, if the claimant establishes that he is disabled, the Commissioner must establish that there is other work which the claimant could perform. *Id.*

Plaintiff’s argument goes to the fourth step in the inquiry, specifically whether he has the residual functional capacity to perform his past work. *Id.* This determination need be made only after plaintiff establishes the existence of a disability. *See id.* As plaintiff’s failure to do so is supported by substantial evidence, the question of whether plaintiff has the capacity to perform past work need not be reached. *See Engler v. Sec’y of Health & Human Servs.*, No. Civ. 84-5062, 1988 WL 13231, at *5 (D.N.J. Feb. 19, 1988).

Assuming arguendo that plaintiff established the existence of a disability, there is substantial evidence for the ALJ’s findings that he was able to return to his previous work. *See White v. Sec’y of Health & Human Servs.*, 910 F.2d 64, 65 (2d Cir. 1990) (plaintiff must establish “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . of such severity that he is . . . unable to do his previous work”). Plaintiff must demonstrate not only an inability to return to his specific job

but also an inability to return to his former type of work. *See Jock v. Harris*, 651 F.2d 133, 135 (2d Cir. 1981). The ALJ may consider job requirements based on “a broad generic, occupational

classification of that job,” “the particular functional demands and job duties peculiar to an individual job as he or she actually performed it” or “the functional demands and job duties of the job as ordinarily required by employers throughout the national economy.” *See* SSR 82-61, 1982 WL 31387, at *1-*2 (SSA 1982).

The ALJ found plaintiff’s past relevant work to be a delivery helper. The ALJ found that the job did not require plaintiff to interpret written instructions or perform complex tasks nor did the job require the performance of work functions precluded by his medically determinable impairments. These findings are supported by substantial evidence.⁵

Plaintiff testified that his prior employment involved paperwork, rudimentary mathematics and reading maps. However, in his vocational report plaintiff indicated that he was required to use equipment but that he was not required to “[u]se technical knowledge or skills,” “[d]o any writing, complete reports, or perform similar duties” or “[h]ave supervisory responsibilities.” The full description of his responsibilities included “used a hand truck and forklift, delivered soda and beer to various customers/buildings.” Contrary to plaintiff’s argument, the ALJ is in the best position to ascertain relevant facts based on credibility determinations in gleaning the requirements of plaintiff’s former employment from the evidence presented. *See* 20 C.F.R. § 404.1527(c)(2). In a vocational analysis conducted August 20, 1998, Debby Rosenberger concluded that plaintiff presented “a

⁵ As discussed in *supra* Part II.B, the ALJ found that plaintiff’s testimony as to his ability to return to prior employment to lack credibility. At the hearing, plaintiff testified that he left his job with Coca-Cola because “I just couldn’t handle it anymore, the paperwork and all that stuff. It was too hard for me.” In Dr. Daniels’s report developed prior to the hearing, plaintiff’s stated basis for leaving was that he “ha[d] an argument with his supervisor.” Presented with conflicting statements, the ALJ acted well-within his authority to find one statement more or less credible than another and resolve the conflict. *See* 20 C.F.R. § 404.1527(c)(2).

favorable vocational outlook for unskilled work” and that he “should be able to return to his past work.”

In addition to the information provided on his former employment, plaintiff testified that he worked paving driveways a year prior to the hearing in exchange for heroin. Medical testimony presented in the reports of Doctors Hill, Santos and Daniels indicated that plaintiff is capable of handling simple instructions. Drs. Hill and Santos opined that plaintiff’s depression would not interfere with his ability to function. Plaintiff provided no evidence of a loss of mental ability that would preclude continued work in the delivery helper position he had held for thirteen years.⁶ There is thus substantial evidence in the record to support the ALJ’s finding that plaintiff has the ability to return to past employment.

E. ALJ’s Decision on Plaintiff’s Vocational Disability

Plaintiff contends that the ALJ’s finding that he was not disabled was based on a failure to consider his inability to meet the basic mental demands of employment and inability to respond appropriately to supervision. Defendant responds that plaintiff performed his past work for more than thirteen years with the same alleged impairment and thus a vocational determination was not required.

Plaintiff argues that defendant’s finding that he was not disabled manifests a failure to consider an SSA policy statement on non-exertional impairments. The policy statement provides in relevant part:

⁶ Plaintiff argues that the ALJ failed to consider the delivery helper title description contained within the United States Department of Labor’s *Dictionary of Occupational Titles*. The ALJ may take administrative notice of such descriptions pursuant to 20 C.F.R. § 404.1566(d), but there is no obligation to do so.

Where a person's only impairment is mental, is not of listing severity, but does prevent the person from meeting the mental demands of past relevant work and prevents the transferability of acquired work skills, the final consideration is whether the person can be expected to perform unskilled work. The basic mental demands of competitive, remunerative, unskilled work include the abilities (on a sustained basis) to understand, carry out, and remember simple instructions; to respond appropriately to supervision, coworkers, and usual work situations; and to deal with changes in a routine work setting. A *substantial loss* of ability to meet any of these basic work-related activities would severely limit the potential occupational base. This, in turn, would justify a finding of disability because even favorable age, education, or work experience will not offset such a severely limited occupational base.

SSR 85-15, 1985 WL 56857, at *3 (S.S.A. 1985) (emphasis added). As an initial matter, plaintiff provided no evidence that his mental ability had diminished since his prior work experience with Coca-Cola, thus there is little evidence of a non-exertional deficiency that would preclude continued employment and implicate SSR 85-15. Other than subjective complaints, there is little basis on which to conclude that plaintiff's non-exertional impairments would preclude continued employment. *See Soto v. Apfel*, 74 F. Supp. 2d 162, 172 (D. Conn. 1999). Importantly, at the time of the hearing, plaintiff had not sought treatment for any psychological condition, *see Murphy v. Sullivan*, 953 F.2d 383, 386 (8th Cir. 1992), thus there is no treatment record to support plaintiff's contention that his alleged impairments rendered him incapable of working or could not be treated.⁷ Reviewing physicians found plaintiff's impairment to be from slight to moderate, that plaintiff followed a demanding working schedule for three months in 1998, and that Dr. Daniels found Plaintiff could perform routine and

⁷ Plaintiff testified that his depression began in 1980 when he was diagnosed and treated for cancer. Social Security payment records indicate that he was employed with Coca-Cola until 1986. The record supports that plaintiff worked with some manifestation of his depression for six years with his former employer. He did not cite depression as a basis for leaving his former employment. There is no evidence in the record in direct support of plaintiff's dyslexia claim, although the evaluations suggest that he is functionally illiterate.

repetitive work. There is substantial evidence to support plaintiff's failure to carry his burden of establishing an inability to return to his prior employment. *See Diaz v. Shalala*, 59 F.3d 307, 315 (2d Cir. 1995). Plaintiff's argument that the ALJ was required to do more before finding that there is no disability is without merit.

IV. CONCLUSION

Plaintiff's Motion for Judgment on the Pleadings (Doc. 4) is denied. Defendant's motion to affirm ALJ's decision (Doc. 10) is granted. The Clerk shall close the file.

SO ORDERED.

Dated at New Haven, Connecticut, June ___, 2002.

Peter C. Dorsey
United States District Judge